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No. 10-511

IN THE

Supreme Court of the United States

HARRY R. JACKSON, JR., ET AL., *Petitioners*,

v.

DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS; DISTRICT OF COLUMBIA, *Respondents*.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the District of Columbia Court of Appeals erred in deciding, as a matter of local law, that the Council of the District of Columbia was authorized to prohibit discriminatory voter initiatives.

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STATEMENT

Petitioners challenge a decision by the District of Columbia Court of Appeals upholding the validity of a longstanding local statute. More than three decades ago, when the Council of the District of Columbia (Council) enacted the legislation that first gave effect to the electorate's right to change District law directly through voter initiatives, the Council prohibited initiatives that would authorize discrimination proscribed by local law.

The District of Columbia Board of Elections and Ethics (Board) applied that narrow prohibition in rejecting petitioners' proposed initiative to ban same-sex marriage. Petitioners contend that the Council lacked authority to ban discriminatory initiatives, but both the Superior Court of the District of Columbia and the District of Columbia Court of Appeals disagreed and affirmed the Board.

1. Statutory background.

a. Home Rule Act. — The Constitution gives Congress authority "[t]o exercise exclusive Legislation" over the District. U.S. Const. art. I, § 8, cl. 17. In 1973, Congress passed the District of Columbia Self-Government and Governmental Reorganization Act (Home Rule Act), Pub. L. No. 93-198, 87 Stat. 774 (1973), for purposes including "delegat[ing] certain legislative powers to the government of the District," "grant[ing] [its] inhabitants . . . powers of local self-government," and "reliev[ing] Congress of the burden of legislating upon essentially local District matters." D.C. Code § 1-201.02(a) (Repl. 2006).

Title IV of the Home Rule Act is the District Charter, which establishes the organizational struc-

ture of the District government. D.C. Code § 1-204.01 *et seq.* (Repl. 2006 & Supp. 2010). The Charter vests the legislative authority granted to the District in the Council. D.C. Code § 1-204.04(a) (Repl. 2006). That authority generally "extend[s] to all rightful subjects of legislation within the District," though ordinary Council acts must be consistent with the Home Rule Act, including the Charter, and do not take effect until after a thirty-day layover period during which Congress may disapprove them. D.C. Code §§ 1-203.02, 1-206.02(c) (Repl. 2006).

The Home Rule Act also specifies certain subject matters on which the Council may not legislate. D.C. Code § 1-206.02(a) (Repl. 2006). In Section 752, however, Congress specifically gave the Council certain authority: "Notwithstanding any other provision of [the Home Rule Act] or of any other law, the Council shall have authority to enact any act or resolution with respect to matters involving or relating to elections in the District." D.C. Code § 1-207.52 (Repl. 2006).

b. Charter Amendments Act. — When adopted, the District's Charter did not provide for the popular rights of initiative, referendum, and recall. Home Rule Act, Pub. L. No. 93-198, tit. IV, 87 Stat. at 785–812. The Charter, however, "may be amended by an act passed by the Council and ratified by a majority" of voters. D.C. Code § 1-203.03(a) (Repl. 2006). At the time, a Charter amendment would take effect if Congress timely "adopt[ed] a concurrent resolution . . . approving such amendment." D.C. Code § 1-125(b) (Supp. 1977). Now, after *INS v. Chadha*, 462 U.S. 919 (1983), an amendment becomes effective unless Congress timely enacts a joint resolution of

disapproval that is transmitted to the President and becomes law. D.C. Code § 1-203.03(b) (Repl. 2006).

The Council passed the Initiative, Referendum, and Recall Charter Amendments Act of 1977 (CAA) on May 17, 1977, during the second Council period after Home Rule began. 24 D.C. Reg. 199 (July 8, 1977); 25 D.C. Reg. 244 (July 14, 1978). In the CAA, the Council proposed to amend the Charter to give the District's electorate the rights of initiative, referendum, and recall. 24 D.C. Reg. at 199–206.

The CAA was not self-executing and did not establish all the particulars of how these rights would have effect in the District. *Convention Ctr. Referendum Comm. v. Bd. of Elections & Ethics (Convention Ctr. I)*, 399 A.2d 550, 552–53 (D.C. 1979). In particular, though it included a definition of the term "initiative" that excluded one particular subject matter, it did not establish which other subject matters would be open to initiatives. D.C. Code § 1-204.101(a) (Repl. 2006) (defining "initiative" as "the process by which the electors . . . may propose laws (except laws appropriating funds) and present such proposed laws directly to the registered qualified electors . . . for their approval or disapproval"). Instead, in the CAA, the Council proposed to give itself the authority and duty to "adopt such acts as are necessary to carry out the purpose of [the act] within 180 days of [its] effective date." D.C. Code § 1-204.107 (Repl. 2006).

After the District's electorate ratified the Charter amendment, Congress passed a concurrent resolution "approv[ing] the action of the District of Columbia Council" in passing the CAA. H.R. Con. Res. 464, 95th Cong., 92 Stat. 3868 (1978). It became effective on March 10, 1978. 25 D.C. Reg. at 244.

c. Initiative Procedures Act. — A month after the CAA became effective, on April 10, 1978, the same, second Council exercised the authority granted in the CAA and introduced the Initiative, Referendum, and Recall Procedures Act of 1978. Council of the District of Columbia, Committee on Government Operations, Committee Report No. 1 on Bill No. 2-317, Initiative, Referendum, and Recall Procedures Act of 1978, at 1 (May 3, 1978). As amended, Bill 2-317 required the Board to reject an initiative if it would authorize discrimination based on personal characteristics including sexual orientation.

Bill 2-317 was reintroduced as Bill 3-2 during the third Council session, in January 1979. *Convention Ctr. I*, 399 A.2d at 553; Council of the District of Columbia, Committee on Government Operations, Report on Bill 3-2, "Initiative, Referendum, and Recall Procedures Act of 1979," at 1 (Jan. 31, 1979). The bill remained the same in relevant respects except that it referred to the District's antidiscrimination law, the Human Rights Act of 1977, rather than itself identify what types of discrimination initiatives could not authorize. *Id.* Apps. A and D.

After laying before Congress without disapproval, the Initiative, Referendum, and Recall Procedures Act of 1979 (IPA) became law in June 1979. 25 D.C. Reg. 10,874 (June 22, 1979). The IPA limits what is a proper subject for an initiative in various ways. D.C. Code § 1-1001.16(b)(1) (Repl. 2006). In particular, in what has become known as the Human Rights Act safeguard or restriction, it directs the Board to refuse to accept a proposed initiative if it "authorizes, or would have the effect of authorizing, discrimination prohibited under" the Human Rights Act. *Id.*

d. Human Rights Act. — Even before Home Rule began, District of Columbia law provided broad protections against discrimination. Council of the District of Columbia, Committee on Public Services and Consumer Affairs, Report on Bill 2-179, "The Human Rights Act of 1977," at 2–3 (July 5, 1977). After the Home Rule Act, the Council was concerned that these protections would lack the force of law if not codified. *Id.* Thus, during the second Council session — the same one in which the CAA was drafted and enacted and the bill that became the IPA was introduced — all thirteen Councilmembers unanimously introduced the Human Rights Act of 1977. *Id.* at 1. The act served to "underscore the Council's intent that the elimination of discrimination within the District . . . should have the highest priority." *Id.* at 3 (internal quotation marks omitted). The Council sought to "affirmatively and forcefully convey to the executive and administrative agencies of the District Government the importance which the Council place[d] on vig[o]rous enforcement of its provisions." *Id.* The act addressed various types of discrimination based on categories including sexual orientation. D.C. Code § 6-2201 *et seq.* (Supp. 1978).

For nearly forty years, District law has thus protected gay, lesbian, and bisexual men and women from discrimination. Today, the Human Rights Act provides, among other things, that the District government may not "refuse to provide any facility, service, program, or benefit to any individual" because of personal characteristics including sexual orientation. D.C. Code § 2-1402.73 (Repl. 2006).

e. Jury and Marriage Amendment Act. — On May 5, 2009, the Council passed the Jury and Mar-

riage Amendment Act of 2009 (JAMA). D.C. Act 18-70, 56 D.C. Reg. 3797 (May 15, 2009). JAMA amended the District's marriage laws to provide that the District will recognize lawful, same-sex marriages entered in other jurisdictions. D.C. Code § 46-405.01 (Supp. 2010). It became law on July 7, 2009, after Congress did not disapprove it. D.C. Law 18-9, 56 D.C. Reg. 6111 (Aug. 7, 2009).

f. Marriage Equality Act. — The Council enacted the Religious Freedom and Civil Marriage Equality Amendment Act of 2009 (Marriage Equality Act) on December 15, 2009. D.C. Act 18-248, 57 D.C. Reg. 27 (Jan. 1, 2010). This legislation allows same-sex couples to marry legally in the District. D.C. Code § 46-401 (Supp. 2010). After Congress again did not disapprove, the Marriage Equality Act became law on March 3, 2010. D.C. Law 18-110, 57 D.C. Reg. 1833 (Mar. 5, 2010).

2. Factual and procedural background.

a. Although this case directly concerns only one proposal for an initiative, that proposal was one of three related proposals. While JAMA was laying before Congress, some of the petitioners here proposed a referendum on whether the District should recognize same-sex marriages from other jurisdictions. Pet. App. 130a. The Board found that the proposed referendum was improper under the Human Rights Act safeguard, and the Superior Court affirmed. Pet. App. 130a–34a. There was no appeal.

Petitioners also filed a proposed referendum regarding the Marriage Equality Act. Pet. 8 n.6. The Board again rejected the measure because it would authorize discrimination prohibited by the Human Rights Act. Pet. 8 n.6. The Superior Court and the

District of Columbia Court of Appeals refused to enjoin the Marriage Equality Act. Pet. App. 9a n.4.

The Chief Justice then denied petitioners' request for a stay pending a petition for certiorari because a grant of certiorari was unlikely. *Jackson v. D.C. Bd. of Elections & Ethics*, 130 S. Ct. 1279, 1280 (2010) (Roberts, C.J., in chambers). While noting that the argument that the Council lacked authority to enact the Human Rights Act safeguard has "some force," he found a stay unwarranted. *Id.* He listed three reasons: (1) the Court's policy of "'defer[ring] to the decisions of the courts of the District of Columbia on matters of exclusively local concern'"; (2) the fact that the Council enactments at issue were subject to review, but Congress "chose[] not to act"; and (3) the opportunity for petitioners again to seek certiorari on their related initiative request. *Id.* (quoting *Whalen v. United States*, 445 U.S. 684, 687 (1980)).

b. On September 1, 2009, petitioners presented the Board with the proposed initiative that is the subject of this case. Pet. App. 5a–6a. It would change local law to declare that "[o]nly marriage between a man and a woman is valid or recognized in the District of Columbia." Pet. App. 6a. As with the related referenda, the Board found that the proposed initiative authorizes discrimination proscribed by the Human Rights Act and so was not a proper subject for initiative. Pet. App. 135a–46a.

Petitioners sought a writ of mandamus in the Superior Court. Pet. App. 147a–69a. The Superior Court granted the motion for summary judgment filed by the District of Columbia (which had intervened in support of the Board) on January 14, 2010. Pet. App. 99a–128a. As relevant, it held that the

Council acted within its authority in prohibiting initiatives and referenda that would violate the Human Rights Act. Pet. App. 106a–17a.

Sitting *en banc*, the District of Columbia Court of Appeals affirmed — the sixth time that a local tribunal in the District has confirmed that the proposed initiative or one of the related referenda was improper under local law. The court recognized that the case implicated a number of issues unique to District governance and ultimately held that "[t]he Council acted within its authority under the CAA and the Home Rule Act in enacting the Human Rights safeguard of the IPA." Pet. App. 3a, 66a.

As relevant here, the majority reasoned that the safeguard is not inconsistent with the text of the CAA, which is ambiguous (Pet. App. 24a–35a); that the Council's interpretation of the CAA, as reflected in the safeguard, is entitled to substantial deference given how the Council drafted the CAA and the safeguard nearly contemporaneously (Pet. App. 35a–40a); that this interpretation is consistent with concerns the Council emphasized at the time it was crafting the CAA (Pet. App. 40a–49a); and that Section 752 of the Home Rule Act allowed the Council to direct the Board to effectuate that interpretation by rejecting discriminatory initiatives, notwithstanding that the Board is an independent District agency (Pet. App. 49a–55a).

ARGUMENT

The Court should deny the petition for certiorari for two independent reasons. First, the case concerns an issue of exclusively local concern; no important questions of federal law are implicated. Second, the decision is entirely correct and is far from being

based on the type of egregious error necessary to overcome the deference due to the District of Columbia Court of Appeals on an issue of exclusively local concern.

I. THIS CASE IS NOT IMPORTANT ENOUGH TO MERIT REVIEW.

A. The case lacks national importance, as it is confined in effect to the District and the holding at issue has limited importance even as a matter of District law.

The relevant holding of the court of appeals is modest. Interpreting the right of initiative as uniquely defined in District law, the court held merely that "[t]he Council acted within its authority under the CAA and the Home Rule Act in enacting the Human Rights safeguard." Pet. App. 66a; *see* Pet. App. 22a–55a.

That holding does not merit this Court's review. The statutes at issue are limited in effect to the District. There is no national analogue to pertinent provisions of District law, and indeed no federal right of initiative at all. Further, although some states have their own initiative rights as defined in state law, this Court's resolution of legal issues in this case would not bind those states, and in any event none has statutory provisions comparable to those at issue. The absence of any national importance is reason enough to deny the petition.

Indeed, the holding at issue has only narrow significance even as a matter of District law. The Human Rights Act safeguard enacted in the IPA is only one of numerous substantive restrictions on the right of initiative, and petitioners concede that all the oth-

er restrictions are valid even though many do not appear in the CAA. Pet'rs C.A. Br. 10 ("The people's initiative power, thus, is subject to the same legislative restrictions as the D.C. Council, including the substantive limits on taxing commuters, amending or repealing acts of Congress, authorizing tall buildings, regulating federal and local courts, and consistency with the United States Constitution."); *see* D.C. Code §§ 1-203.02, 1-206.02(a) (Repl. 2006); *Convention Ctr. Referendum Comm. v. D.C. Bd. of Elections & Ethics (Convention Ctr. III)*, 441 A.2d 889, 897 (D.C. 1981) (*en banc*). The IPA articulated only a narrow further prohibition on those initiatives that "authorize[], or would have the effect of authorizing, discrimination prohibited under" the Human Rights Act. D.C. Code § 1-1001.16(b)(1) (Repl. 2006).

The right of initiative thus remains broad but not unlimited. Citizens have filed over a hundred proposed initiatives with the Board on topics including criminal sentencing, historic preservation, term limits, and much more. District of Columbia Board of Elections and Ethics, List of Past Initiatives, http://www.dcboee.org/popup.asp?url=/pdf_files/pn_640.pdf (last visited Dec. 14, 2010).

History confirms, moreover, that the issues raised are not important enough to merit review by this Court. As the dissent below noted, "[a]lthough the Human Rights Act limitation on the right of initiative has existed for more than thirty years, this is the first challenge to its validity." Pet. App. 85a–86a. Certiorari is not warranted for a problem that does not go "beyond the academic or the episodic." *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955).

B. Petitioners' attempts to show sufficient importance to justify review fail.

Petitioners make three arguments in attempting to show a question so important that this Court should decide it. Each is meritless.

1. Petitioners first say that this case is important enough to merit review because the court of appeals misconstrued "congressional enactments," and "[t]he centrality and supremacy of congressional enactments here warrant this Court's review." Pet. 14–15. As an initial matter, petitioners' argument is based on an error of fact. As the majority and dissent below agreed, the meaning of the CAA is the key issue here, and the CAA was an act of the *Council*. Pet. App. 22a–49a, 73a–85a. Congress did not enact the CAA; rather, it passed a concurrent resolution "approv[ing] *the action of the District of Columbia Council*" in passing the CAA. H.R. Con. Res. 464, 92 Stat. at 3868 (emphasis added).

Perhaps in recognition of that fact, petitioners contend that the court below misread Section 752 of the Home Rule Act, in which Congress gave the Council "authority to enact any act or resolution with respect to matters involving or relating to elections in the District." Pet. 14; D.C. Code § 1-207.52 (Repl. 2006). Contrary to what petitioners say, however, the court did not rely on this section as independent, "unbounded" authority for the Council to "impose additional restrictions on (or conceivably eliminate) the people's initiative power." Pet. 11, 20. The court in fact explicitly "decline[d] to interpret" Section 752 in such a way that the Council could render the initiative right "meaningless," or "so diminish [it] as virtually to nullify it." Pet. App. 52a.

The court thus relied on Section 752 only to overcome the argument that the Council could not order the Board, an independent agency, to do anything. Pet. App. 5a, 49a–55a, 66a. As construed by the court, Section 752 allowed the Council to reject discriminatory initiatives without allowing a vote first, "notwithstanding the Board's status as an independent agency" under District law. Pet. App. 53a–54a.

In any event, no one doubts that Congress has supreme legislative authority over the District; the court below explicitly recognized as much. Pet. App. 10a. So too the court recognized that the District's Charter functions like a constitution, in that the Council may not enact ordinary legislation inconsistent with the Charter. Pet. App. 19a–20a, 37a–38a. The question is not whether Congress's statutes and the Charter should control, but rather whether the Council exceeded its authority as defined in those statutes and the Charter when it enacted the Human Rights Act safeguard in the IPA.

Although petitioners contend that the court of appeals erred in resolving this question, this Court does not review every case in which a petitioner contends that a statute passed by Congress was misconstrued. *See* Sup. Ct. R. 10. To the contrary, the fact that Congress can legislate anew if it thinks the Council has exceeded its authority lessens the need for this Court's review, as the Chief Justice concluded in rejecting petitioners' earlier request for a stay. *Jackson*, 130 S. Ct. at 1280 (Roberts, C.J., in chambers) (relying in part on Congress's "cho[ice] not to act").

2. Petitioners next contend that this case is important because the holding of the court of appeals

will lead to increased lobbying of Congress by those who would seek to legislate by initiative but cannot due to the Human Rights Act safeguard. Pet. 15–17. Petitioners err, however, in relying on the Home Rule Act in suggesting that Congress has expressed an interest in avoiding increased lobbying relating to the District.

The Home Rule Act indicates that Congress "reserves the right, at any time, to exercise its constitutional authority as legislature for the District, by enacting legislation for the District on any subject." D.C. Code § 1-206.01 (Repl. 2006). Further, Congress reserved a role for itself in the local legislative process, as ordinary Council acts do not become law until after a thirty-day layover period during which Congress may disapprove them. D.C. Code § 1-206.02(c) (Repl. 2006). Although Congress expressed a desire to "relieve [itself] of the burden of legislating upon essentially local District matters," D.C. Code § 1-201.02(a) (Repl. 2006), Congress did so by allowing the Council to legislate in the first instance but retaining its own role in District governance. Lobbying of Congress on District matters is thus consistent with, not contrary to, Congress's purposes as expressed in the Home Rule Act.

Moreover, at most, Congress could expect a trivial increase in lobbying due to the holding of the court of appeals, especially considered in proportion to the amount of lobbying Congress currently receives. Petitioners contend that "[r]ecent events prove the[ir] point," Pet. 16, but the opposite is true. As petitioners relate, the District's recent legislation relating to same-sex marriage has led some in Congress to introduce resolutions or bills to change how District

law defines marriage. Pet. 16 & n.7. The draft resolutions they cite, however, are part of the established Home Rule Act process by which Congress may disapprove legislation enacted by the Council. H.J. Res. 54, 111th Cong. (2009); H.J. Res. 72, 111th Cong. (2010). They show how members of Congress may become involved in District affairs as an intended result of the Home Rule Act and are a reason for this Court to decline review, not to grant it.

Further, Congress's recent activity has to do with the politically charged nature of same-sex marriage, not with the Human Rights Act safeguard itself. That is made plain by the bills petitioners cite. Their operative provisions are limited to the topic of same-sex marriage; none would alter the holding of the court of appeals that the Human Rights Act safeguard is valid. *E.g.*, H.R. 2608, 111th Cong. (2009); H.R. 4430, 111th Cong. (2010); S. 2980, 111th Cong. (2010). That is unsurprising given that petitioners cite no prior instance in which Congress was lobbied, or took any activity, because of the Human Rights Act safeguard. There is no reason to expect that the application of the Human Rights Act safeguard will ever again lead to even this level of congressional attention.

3. Petitioners finally argue that the court of appeals in approving the Human Rights Act safeguard "materially altered the congressionally approved division of legislative power in the District." Pet. 17–20. Their argument in this regard is based on two principal overstatements.

First, petitioners exaggerate the reach of the safeguard in suggesting that every form of "classification" might be suspect under the Human Rights Act

and that the statute has "limitless elasticity." Pet. 18. The Human Rights Act is a "far-reaching prohibition against discrimination of many kinds," but it reaches only defined areas such as employment, housing, public accommodations, and education. D.C. Code § 2-1402.01 *et seq.* (Repl. 2007 & Supp. 2010); *Executive Sandwich Shoppe v. Carr Realty Corp.*, 749 A.2d 724, 732 (D.C. 2000).

Petitioners similarly lack support for the claim that the Board can deny a proposed initiative merely on the anticipation that it may authorize discrimination based on a "*future* classification[]." Pet. 18. To the contrary, the Board must "determin[e] whether a proposed initiative would authorize discrimination of the type *currently* prohibited by the District's human rights law." Pet. App. 65a (emphasis added); *see* D.C. Code § 1-1001.16(b)(1) (Repl. 2006).

It is thus simply not true that, in petitioners' example, the Human Rights Act safeguard "would likely prevent the people from proposing any statute that treats homeowners more favorably than renters, or persons residing in the District more favorably than persons residing outside the District." Pet. 19 n.9. Indeed, the court below has rejected a similar attempt to exaggerate the scope of the Human Rights Act safeguard. *Hessey v. Burden*, 615 A.2d 562, 579–80 (D.C. 1992). That court can be trusted to do so again if any proposed initiative is rejected on an overbroad reading of the Human Rights Act. That possibility is no reason to grant certiorari now.

Second, petitioners exaggerate in claiming the reasoning of the court of appeals gives the Council authority in the future to "erode or even practically abolish the people's initiative right." Pet. 19. That

fear is purely speculative, as the Council in the three decades after the IPA has never adopted another substantive limitation. Pet. App. 46a.

In any event, the court's reasoning could not be applied to any future attempt to do so. The court relied heavily on the fact that the IPA was adopted nearly contemporaneously with the CAA. Pet. App. 35a–40a (citing cases including *Eldred v. Ashcroft*, 537 U.S. 186, 213 (2003)). The court also relied heavily on the contemporaneity of the CAA and the Human Rights Act, as well as the unique importance the Council placed on the latter. Pet. App. 40a–49a. Those reasons for upholding the Human Rights Act safeguard would not apply to any future limitation on the right of initiative. And though petitioners suggest the court read Section 752 as a broad authorization for future Council action, Pet. 20, that is incorrect for the reasons above.

4. Petitioners never contend that the Court should take this case because it involves the marriage rights of same-sex couples. Nor should it do so. This case has to do only with whether the electorate in the District should have the ability to pursue ballot measures that would violate District laws prohibiting discrimination, rather than go through normal political processes. Further, even if the electorate voted on and approved petitioners' initiative, the Council could then exercise its normal legislative authority to repeal the resulting law. Pet. App. 97a (citing *Atchison v. District of Columbia*, 585 A.2d 150, 155 (D.C. 1991)). If this Court has an interest in the marriage rights of same-sex couples, it would be more sensible to await a case addressing what bearing the Constitution has on the topic.

II. THIS COURT DEFERS TO THE DISTRICT OF COLUMBIA COURT OF APPEALS ON MATTERS PERTAINING EXCLUSIVELY TO THE DISTRICT EXCEPT ON A SHOWING OF EGREGIOUS ERROR, AND IN FACT THE DECISION BELOW IS CORRECT.

A. Because this case presents an issue of exclusively local concern, the Court should defer absent a showing that the court below committed egregious error.

1. Long before Congress restructured the District's local judiciary in the District of Columbia Court Reform and Criminal Procedure Act of 1970 (Court Reform Act), Pub. L. No. 91-358, 84 Stat. 473, this Court had adopted a practice of deferring to interpretations of District law, including acts passed by Congress for the District, by the District's courts. This longstanding practice is to refrain from "interfer[ing] with the local rules of law which they fashion, save in exceptional situations where egregious error has been committed." *Fisher v. United States*, 328 U.S. 463, 476 (1946); *see, e.g.*, *Griffin v. United States*, 336 U.S. 704, 712–18 (1949); *District of Columbia v. Pace*, 320 U.S. 698, 702 (1944).

That practice became all the more appropriate with the Court Reform Act. "One of [its] primary purposes . . . was to restructure the District's court system so that 'the District will have a court system comparable to those of the states and other large municipalities.'" *Pernell v. Southall Realty*, 416 U.S. 363, 367 (1974) (quoting H.R. Rep. No. 91-907, at 23 (1970)). "This new structure plainly contemplates that the decisions of the District of Columbia Court of Appeals on matters of local law . . . will be treated

by this Court in a manner similar to the way in which we treat decisions of the highest court of a State on questions of state law." *Id.* at 368. Thus, the principle that the Court should not "overrul[e] the courts of the District on local law matters 'save in exceptional situations where egregious error has been committed'" is both "long embedded in practice and now supported by the clear intent of Congress." *Id.* at 369 (quoting *Fisher*, 328 U.S. at 476); *see Palmore v. United States*, 411 U.S. 389, 408–10 (1973); *Key v. Doyle*, 434 U.S. 59, 64–68 (1977).

2. Petitioners make four arguments why deference nonetheless is not due here even assuming that the court below did not commit egregious error. Each is meritless.

a. Petitioners first suggest that this matter is not one of exclusively local concern because it affects "important federal interests." Pet. 24–26. The Chief Justice has already indicated otherwise in denying their related motion for a stay. *Jackson*, 130 S. Ct. at 1280 (Roberts, C.J., in chambers). Even were that not so, petitioners' claim in this regard is merely that review is necessary to further the supposed federal interest in limiting the lobbying Congress receives regarding District matters. Pet. 24–25. That is incorrect for the reasons above.

Moreover, petitioners' suggestion that the deference due should depend on speculation about how the case might lead to increased lobbying of Congress, rather than on the case's subject matter, is inconsistent with congressional intent. Again, that "clear intent," expressed in the Court Reform Act, is that this Court should not "overrul[e] the courts of the District on local law matters 'save in exceptional

situations where egregious error has been committed.'" *Pernell*, 416 U.S. at 369. There is no good reason to think Congress would have intended this Court to decide whether to defer based on an unworkable rule requiring an assessment of how likely a case will lead to more lobbying, and if so how much more. *Cf. Fed. Power Comm'n v. S. Cal. Edison Co.*, 376 U.S. 205, 215–16 (1964) (interpreting relevant statutes to make an agency's "jurisdiction over interstate sales of gas or electricity at wholesale" turn on a "bright line easily ascertained" rather than "a case-by-case analysis of the impact of state regulation upon the national interest").

Indeed, the case on which petitioners rely, Pet. 24–25, supports giving deference here. In *Limtiaco v. Camacho*, 549 U.S. 483 (2007), the Court found that a matter of Guam law was not of "purely local concern." *Id.* at 491. It did not rely on how the matter might affect lobbying of Congress or any other indirect effect on a federal interest. Rather, the Court relied on the subject matter of the case, as the debt-limitation provision at issue directly "protect[ed] both Guamanians and the United States from the potential consequences of territorial insolvency." *Id.* The federal government has an obvious interest in ensuring that federal dollars entrusted to a federal enclave in appropriations packages are not wasted. No such interest is present here.

b. Petitioners next argue that the "construction of congressional enactments" inherently is not a matter of local concern. Pet. 25–26. Again, however, the key issue is how to interpret an enactment by the Council, not by Congress. In any event, their argument is simply wrong; this Court does defer to the

District of Columbia Court of Appeals when it interprets legislation enacted by Congress in its capacity as supreme local legislature. In *Whalen*, for instance, this Court explained:

> [T]his case comes from the District of Columbia Court of Appeals, and the statutes in controversy are Acts of Congress applicable only within the District of Columbia. In such cases it has been the practice of the Court to defer to the decisions of the courts of the District of Columbia on matters of exclusively local concern.

445 U.S. at 687 (citing *Pernell*, 416 U.S. at 366; *Griffin*, 336 U.S. at 717–18; *Fisher*, 328 U.S. at 476); *see Pace*, 320 U.S. at 700–02. The case on which petitioners rely is plainly inapposite, as it deals with a question of sufficiency of evidence, not statutory construction. Pet. 25–26 (relying on *In re Sawyer*, 360 U.S. 622, 640 (1959) (plurality op.)).

c. On a related point, petitioners contend that deference is unwarranted because the Home Rule Act is a "congressional organic act." Pet. 30–32. Again, that suggestion is inconsistent with the intent of the Court Reform Act and inapplicable here because this case primarily concerns the construction of a Council enactment.

In any event, they cite no case supporting the proposition that deference is not appropriate when an organic act enacted by Congress is at issue. Aside from *Limtiaco*, the cases they cite do not even discuss deference. Instead, they merely show that the Court sometimes decides to review cases involving organic acts where those cases implicate important federal interests. *E.g.*, *ASARCO Inc. v. Kadish*, 490 U.S. 605, 633 (1989) (addressing conditions on "the

sale or lease of mineral lands granted to the State of Arizona under . . . federal statutes"); *Lassen v. Arizona*, 385 U.S. 458, 460–61, 469–70 (1967) (similar). Those cases do not aid petitioners, who fail to show this case implicates important federal interests.

d. Petitioners finally err in suggesting in passing that this Court will decline to defer in "exceptional cases" regardless of whether the issue is one of exclusively local concern. Pet. 30. The case they cite actually says that this Court will review the resolution of local law questions by the District's local courts "*[o]nly* in exceptional circumstances." *Griffin*, 336 U.S. at 718 (quoting *Busby v. Elec. Utils. Emps. Union*, 323 U.S. 72, 75 (1944) (*per curiam*)) (emphasis added). The Court did not indicate in *Griffin* that it will decline to defer whenever it thinks a case exceptional in any way, or whenever it thinks the court below has "gone astray" in any way. Pet. 23. Rather, consistent with the later-enacted Court Reform Act and *Pernell*, the "exceptional situations" in which the Court will not defer on matters of local concern are limited to those "where egregious error has been committed.'" 416 U.S. at 369 (quoting *Fisher*, 328 U.S. at 476).

B. Far from being based on egregious error, the decision below is correct.

The decision below is correct. As the court summarized:

> (1) resolution of this appeal turns on what legislative authority the Council intended to share with the people of the District of Columbia when it passed [the CAA]; (2) the Human Rights Act safeguard is not inconsistent with the Council's intent as conveyed by the

> language of the CAA; (3) this court owes substantial deference to the Council's legislative interpretation that the Human Rights Act safeguard carries out the intent of the CAA; (4) the relevant history convinces us that the Council could not have intended to authorize, as a proper subject of initiative, any initiative that would have the effect of authorizing discrimination prohibited by the Human Rights Act; [and] (5) the Home Rule Act gave the Council authority to direct the Board, through the legislation that the Council passed to implement the CAA, to refuse to accept an initiative that would authorize prohibited discrimination . . . .

Pet. App. 4a–5a.

Petitioners do not show error, and do not come close to establishing the type of egregious error necessary to justify dispensing with the deference normally due the District of Columbia Court of Appeals on matters of local law. They rely primarily on the dissenting opinion below. Pet. 26. That opinion, however, never suggests that the opinion of the court is egregiously wrong, just that some judges disagreed and thus "respectfully dissent[ed]." Pet. App. 66a–98a. Further, though petitioners identify the "worst" of the supposed errors in the court's opinion, Pet. 26, the court was in fact correct on each of these three points.

First, petitioners argue that the court incorrectly "supplanted the clear intent of Congress and the people for the exclusive intent of the Council." Pet. 26–28. That argument fails both because the court was correct to focus on the Council and because peti-

tioners fail to show that Congress and the voters who approved the CAA had any different intent.

The Home Rule Act as enacted did not authorize initiatives but rather gave the legislative power of the District entirely to the Council. Pet. 10a, 12a. As the court below recognized, the proper interpretation of the CAA must account for the fact that it was an act of the Council:

> through section 303 of the Home Rule Act, Congress gave a broad grant of legislative power *to the Council alone* (subject to specified restrictions . . .). In passing the CAA, the Council had to decide the extent of the legislative power it would share with the people. Thus, to resolve the issue that is before us, the Council's intent when it passed the CAA is paramount.

Pet. App. 23a (footnotes omitted).

That reasoning is directly supported by the text of the Home Rule Act. Section 303 allows for amendment of the Charter "by an act passed by the Council and ratified by" the voters "in the referendum held for such ratification." D.C. Code § 1-125(a) (Supp. 1977); D.C. Code § 1-203.03(a) (Repl. 2006). Congress chose to limit the voters' role in amending the Charter to one of approving actions of their elected representatives in the Council, like the CAA.

Section 303 similarly envisions that Congress would decide whether to approve the Council's action, not substitute its own understanding of a Charter amendment for the Council's. Under the statute as it existed at the time, the Charter was amended by an act of the Council ratified by the voters. D.C.

Code § 1-125(a) (Supp. 1977). Congress's later approval was needed only for the amendment to "take effect." D.C. Code § 1-125(b) (Supp. 1977). Further, Section 303 did not suggest that Congress will itself legislate by enacting a law amending the Charter. Rather, it foresaw Congress acting through "a concurrent resolution . . . approving [the] amendment." *Id.* Section 303 thus did not contemplate that Congress would legislate anew, *see Chadha*, 462 U.S. at 945–51, but that Congress would decide whether to allow the Council's action to take effect. Accordingly, the concurrent resolution approving the CAA indicated merely "[t]hat the Congress approves the action of the District of Columbia Council" in passing the act. H.R. Con. Res. 464, 92 Stat. at 3868.

Moreover, even if the court below had been wrong to think the Council's intent paramount, petitioners fail to demonstrate that the voters or Congress had contrary intent—let alone the "clear" contrary intent they must claim. Pet. 26. The ballot for the CAA referendum "asked voters to approve creation of the right to legislate by initiative, but did not ask them to vote as to the scope of the initiative power." Pet. App. 25a–26a n.19. Similarly, the Senate report that petitioners cite indicates that the voters on that referendum supported an initiative right, but does not speak to the scope of the right. Pet. 28 (citing S. Rep. No. 95-673, at 2 (1978)).

Second, petitioners raise the related arguments that the court below erred in relying on a CAA provision that supposedly "authorize[d] the Council to enact only procedural implementing legislation," and that the CAA in setting forth one substantive restriction on initiatives unambiguously excluded the

adoption of any other. Pet. 28–29. Both arguments are incorrect.

As an initial matter, nothing in the CAA indicated that the Council could implement it only through "procedural" legislation. That word appears nowhere in the CAA, or in the passage of legislative history petitioners cite. Pet. 19; *see* H.R. Rep. No. 95-890, at 17 (1978). To the contrary, the CAA authorized the Council to enact whatever legislation it deemed "necessary to carry out" the purpose of the CAA. D.C. Code § 1-204.107 (Repl. 2006). Petitioners do not dispute that, as the court below found, the Council would deserve substantial deference in deciding that the Human Rights Act safeguard was necessary to carry out that purpose, given that the Council itself drafted the CAA and that it enacted the safeguard in the IPA nearly contemporaneously with the CAA and the Human Rights Act itself. Pet. App. 35a–49a. Petitioners thus are reduced to attempting to show that the CAA unambiguously leaves no room for the safeguard.

Petitioners cannot make that showing. They rely on the *definitional* section of the CAA, which defines the term "initiative" as a "process" for "propos[ing] laws (except laws appropriating funds)." D.C. Code § 1-204.101(a) (Repl. 2006). No provision in the CAA indicates, however, that all other subject matters will be open to initiative. That omission is particularly notable given that the part of the CAA relating to recalls of elected officials contains an *operational* section expressly establishing that "[a]ny elected officer of the District of Columbia government (except the Delegate to Congress for the District of Columbia) may be recalled." D.C. Code § 1-204.112 (Repl.

2006). Moreover, again, everyone agrees that various other substantive restrictions apply to the right of initiative beyond that relating to "laws appropriating funds." Pet'rs C.A. Br. 10; Pet. App. 25a, 73a–74a. The court below was thus correct to find the CAA ambiguous as to the scope of the initiative right. Pet. App. 24a–35a.

Third, again, petitioners contend that the court erred in interpreting Section 752 of the Home Rule Act to grant the Council "ill-defined and unconstrained power." Pet. 29. Again, however, petitioners simply misread what the court held regarding Section 752. Like the other assertions of error, this one disappears on a proper reading of the well-reasoned opinion below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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